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Over-Preemption of State Vacatur Law: State Courts and the FAA

Jill I. Gross

Elisabeth Haub School of Law at Pace University, jgross@law.pace.edu

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Articles

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Jill I. Gross*

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* Associate Professor of Law and Co-Director, Securities Arbitration Clinic and Pace Investor Rights Project, Pace Law School. A.B. Cornell; J.D. Harvard. I would like to thank Barbara Black for her steady stream of useful comments and suggestions, and Peter Dawson, Pace Law School '05, for his steady and reliable research assistance.

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I. INTRODUCTION

Several recent decisions in state courts vacating multi-million dollar arbitration awards have garnered significant attention from the media due to the size of the award vacated.¹ A subsidiary issue, however, has escaped attention: the courts' inconsistent use of the preemption doctrine² under the Federal Arbitration Act (FAA)³ to preempt state statutory grounds governing motions to vacate. The FAA preemption doctrine provides that the federal substantive law of arbitrability⁴ preempts conflicting state laws in federal and state court.⁵ For example, in *Sawtelle v. Waddell & Reed, Inc.*,⁶ a panel in New York's Appellate Division, First Department vacated a \$25 million punitive damages

1. See, e.g., Gary Young, *Courts Are Increasingly Intervening in Arbitration Cases*, NAT'L L.J., Feb. 28, 2003, at A15; Tamara Loomis, *\$25 Million Arbitration Award Is Upset*, N.Y.L.J., Feb. 13, 2003, at 1 (reporting on Appellate Division's vacatur of punitive damages portion of \$27 million arbitration award in *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (N.Y. App. Div. 2003)); Tamara Loomis, *Recent Ruling Vacates \$28 Million Finding for Claimant*, N.Y.L.J., Jan. 16, 2003, at 5 (reporting on Appellate Division, First Department's vacation of award in *Sands Bros. & Co. v. Generex Pharmaceuticals, Inc.*, 720 N.Y.S.2d 450 (N.Y. App. Div. 2001)); Tom Perrotta, *\$5.7 Million Securities Arbitration Award Nullified*, N.Y.L.J., Oct. 17, 2001, at 1 (reporting on Supreme Court's vacation of award in *In re Arbitration Between UBS Warburg L.L.C. and Auerbach, Pollak & Richardson Inc.*, 744 N.Y.S.2d 364 (N.Y. App. Div. 2002)).

2. See *infra* notes 36-81 and accompanying text.

3. 9 U.S.C. §§ 1-16 (2003).

4. Arbitrability refers to "whether the parties agreed to submit the claim to arbitration." Barbara Black, *Securities Arbitration is Not Supposed To Be So Complicated: Arbitrability, the Eligibility Rule, and Whose Law Decides*, 30 SEC. REG. L.J. 134, 137 (2002).

5. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

6. 754 N.Y.S.2d 264 (N.Y. App. Div. 2003).

award arising out of an employment dispute in the securities industry, on the ground that the arbitrators “completely ignored applicable law” in awarding punitive damages to the claimant.⁷ Without discussion—other than an acknowledgement that the FAA governs employment disputes in the securities industry—the court summarily decided the threshold issue that the standard of review of the award was found in section 10 of the FAA and the federal judicially created “manifest disregard of the law” test and not New York’s arbitration statute.⁸

In contrast, two other panels of the same court applied New York statutory grounds to motions to vacate securities arbitration awards. In *Sands Bros. & Co. v. Generex Pharmaceuticals, Inc.*,⁹ the First Department, also without discussion, affirmed the lower court’s vacatur of a \$28 million arbitral award on state law grounds, stating that the panel failed to comply with an earlier directive of the court¹⁰ and that the

7. *Id.* at 273. Applying the United States Supreme Court’s three-factor test set forth in *BMW of North America v. Gore*, 517 U.S. 559 (1996), the court ruled that the punitive damages award was grossly excessive in violation of the Due Process Clause of the United States Constitution. As a result, the court vacated the \$25 million punitive damages portion of the \$27 million award. *Id.* at 276. Surprisingly, on remand, the arbitration panel re-affirmed its \$25 million punitive damages award, and explicitly stated that it granted the award pursuant to the claimant’s claim under the Connecticut Unfair Trade Practices Act. SECURITIES ARBITRATION ALERT 2003-36. Again, in response to the claimant’s motion to confirm the award, the respondent cross-moved to vacate the punitive damages award. The Supreme Court, New York County, vacated the award on the grounds that it “failed completely to take [the holding of the Appellate Division] into account” and directed parties to submit the issue of punitive damages to a new panel. See *Sawtelle v. Waddell & Reed, Inc.*, No. 115056/01, slip. op. at 3 (N.Y. Sup. Ct. Jan. 22, 2004).

8. *Sawtelle*, 754 N.Y.S.2d at 273.

9. 749 N.Y.S.2d 17 (N.Y. App. Div. 2002). *Sands Bros.* involved a dispute arising out of a financial services agreement between a brokerage firm and a start-up company. The agreement did not contain a predispute arbitration clause, but the lower court compelled *Sands Bros.* to arbitrate the dispute pursuant to New York Stock Exchange (NYSE) rules because *Sands Bros.* is a NYSE member. Telephone Interview with Richard A. Roth, Esq., Counsel for *Sands Bros.* (Sept. 29, 2003).

10. See *Sands Bros. & Co. v. Generex Pharms., Inc.*, 720 N.Y.S.2d 450 (N.Y. App. Div. 2001). The arbitration panel had ordered *Generex* to pay \$28 million in damages (mostly made up of lost profits) and to issue certain warrants to *Sands*. After the Supreme Court confirmed the award, this opinion of the First Department vacated the declaratory judgment portion of the award directing the issuance of warrants because it was too indefinite. *Id.* at 451. Interestingly, in this earlier opinion, the First Department applied both FAA and state statutory grounds to

award was “totally irrational,” a ground for reversal in New York’s [Civil Practice Law and Rules] CPLR section 7511.¹¹

Similarly, in *In re Arbitration Between UBS Warburg L.L.C. and Auerbach, Pollak & Richardson, Inc.*,¹² the First Department affirmed the trial court’s vacatur on state law grounds of a \$5.7 million arbitration award in a securities dispute between brokerage firms over a fraudulent securities transaction. The lower court had noted tersely that the parties’ arbitration agreement included a generic New York choice of law clause and that was why CPLR section 7511 governed the motion to vacate.¹³ The Appellate Court did not discuss the standard of review of the award, but wrote merely that the Supreme Court had “properly determined” that the panel had “manifestly disregarded the applicable law.”¹⁴

These conflicting decisions highlight the difficulties that state courts have encountered applying the Supreme Court’s current FAA preemption jurisprudence. These difficulties focus primarily on whether the FAA preempts in state court only substantive state rules, such as those regulating parties’ arbitration agreements, or also state arbitration law, such as procedures governing the arbitration process.¹⁵ As a result, one immediate challenge for scholars, litigants, and judges will be to reconcile the various Supreme Court preemption cases to come up with a cohesive doctrine for state courts to apply to arbitration decisions.¹⁶

One area where the struggle is in its infancy is in the vacatur context: where a losing party to an arbitration award moves to overturn the award in court. Section 10 of the FAA sets forth explicit grounds on

modify the lower court’s confirmation of the award and remanded it back to the arbitrators for further findings. *Id.*

11. *Sands Bros.*, 749 N.Y.S.2d at 18; N.Y. C.P.L.R. § 7511 (McKinney 2003).

12. 744 N.Y.S.2d 364 (N.Y. App. Div. 2002).

13. See *In re Arbitration Between UBS Warburg L.L.C. and Auerbach, Pollak & Richardson, Inc.*, No. 119163/00, 2001 WL 1586978 (N.Y. Sup. Ct. Oct. 2, 2001); see also N.Y.L.J. Oct. 22, 2001, at 21.

14. *UBS Warburg*, 744 N.Y.S.2d at 364.

15. See Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 202-04 (2002).

16. Professors Hayford and Palmiter have attempted this reconciliation, and have outlined a “blueprint” of “arbitration federalism”—FAA preemption principles for states to follow in deciding various arbitration-related issues to respect Supreme Court FAA jurisprudence, preserve a role for their own state’s arbitration laws, and respect the national policy favoring arbitration. This “blueprint” identifies issues in three spheres, each of which preserves a different role for state law: the preemptive core, the preemptive boundary, and the preemptive penumbra. See *id.* at 193-208.

which a court can vacate¹⁷ an arbitration award.¹⁸ Additionally, forty-nine of fifty states have statutory provisions designating the grounds for vacatur, some of which are identical to the FAA grounds.¹⁹ Moreover, all federal courts, and state courts to a more limited degree, have crafted additional nonstatutory common law grounds for vacatur, including the oft-cited “manifest disregard of the law” standard.²⁰ Because parties might file a motion to vacate in state or federal court, depending on jurisdiction,²¹ for each vacatur motion, courts must decide the threshold

17. Section 11 of the FAA, provides additional grounds for modifying or correcting an award.

18. Section 10(a) provides that:

[T]he United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration (1) Where the award was procured by corruption, fraud or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. . . .”

9 U.S.C. § 10 (2003).

For an exhaustive analysis of federal courts’ interpretation of these statutory grounds, see Stephen L. Hayford, *Law in Disarray: Judicial Standard for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 745-63 (1996).

19. Forty-seven of fifty states (excluding Georgia, Alabama, and West Virginia), Puerto Rico and the Virgin Islands have adopted, in whole or in part, the Uniform Arbitration Act (UAA), which sets forth grounds for vacatur virtually identical to section 10 of the FAA. For the text of the UAA, see <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm> (last visited February 17, 2004). While Georgia and West Virginia have not adopted the UAA, their arbitration codes include vacatur grounds. See GA. CODE ANN. § 9-9-13 (2003) (recently codifying “manifest disregard of the law” standard); W. VA. CODE § 55-10-4 (2003). Alabama has no statutory grounds of vacatur; instead its courts rely on common law grounds exclusively. See *Rayburn v. Bailes*, 565 So. 2d 122, 125 (Ala. 1990).

20. For an extensive analysis of federal courts’ interpretation on non-statutory grounds, see Hayford, *supra* note 18, at 763-801.

21. It is well-settled that the FAA does not confer subject-matter jurisdiction in federal court. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). Thus, only parties with diversity or subject-matter jurisdiction on other grounds (e.g., a claim in admiralty) can file a motion to vacate in federal court. Cf. *Greenberg v. Bear Stearns & Co.*, 220 F.3d 22, 26 (2d Cir. 2000) (recognizing general rule, but permitting a finding of jurisdiction on an investor’s

issue of whether section 10 of the FAA or the state law statute provides the standard of review.²²

Some scholars suggest that section 10 might preempt state vacatur law if it differed from the FAA, but decline to engage in a detailed analysis of the issue.²³ Yet, while most state statutes are identical or substantially similar to section 10 of the FAA,²⁴ to the extent the grounds are different, state courts have a strong interest in application of their own states' law.²⁵ Most significantly, if a state court chooses to apply the "manifest disregard of the law" standard for vacatur accepted by every federal circuit (although with varying degrees of strictness) under the

motion to vacate award based on claim arising under the federal securities laws when disposition of the matter "necessarily depends on resolution of a substantial question of federal law") (internal quotations omitted).

22. A corollary issue beyond the scope of this Article is whether parties may contractually expand the standards of judicial review of an award. Generally, state courts do not allow parties to contractually provide for expanded court review. *See, e.g., John T. Jones Const. Co. v. City of Grand Forks*, 665 N.W.2d 698, 703-04 (N.D. 2003) (collecting cases). In contrast, the federal circuits are split. *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998-1000 (9th Cir. 2003) (en banc) (collecting cases on both sides of circuit split).

23. *E.g., 1 IAN R. MACNEIL, RICHARD E. SPEIDEL, THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW* § 10.8.2.4 (1999 Supp.) (stating that "[a]t present it is not possible to tell whether the Supreme Court will hold any section other than FAA § 2 explicitly to supersede state law in state-court proceedings" but also asserting that a state court's approach was "wrong" when it held its grounds for vacatur were not preempted because they did not differ from the FAA grounds); Hayford & Palmiter, *supra* note 15, at 176, 206-07 (acknowledging that the Supreme Court has recognized that the FAA speaks "ambiguously" on issues such as the preemptive scope of post-award judicial review and stating that it is an "interesting question" as to "whether state arbitration law could modify the grounds for vacatur"); Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 74 (stating that there is no definitive Supreme Court case law specifying the preemptive effect of "back end" issues of the FAA, including vacatur under section 10(a), although predicting that preemption was "likely").

24. *See Murray S. Levin, The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AMER. BUS. L.J. 105, 110 (1997) (noting that most state statutes providing grounds for vacatur parallel those in the FAA).

25. *See Barry Friedman, Valuing Federalism*, 82 MINN. L. REV. 317 (1997) (cataloguing values of maintaining balance between state and federal law); *see also Calvin Massey, Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002) (discussing values of federalism and asserting that the Rehnquist Court has disregarded these important values in its preemption decisions).

reasoning that it is part of the FAA,²⁶ when that state has rejected such a ground under state law, then the court will have trumped its own state's policy to restrict judicial review of the merits of an arbitral award. This is precisely the situation in Missouri, where a state court applied the manifest disregard standard under federal law (without citing a United States Court of Appeals for the Eighth Circuit case),²⁷ even though Missouri courts have rejected it as a state law ground for vacatur.²⁸ Likewise, in New York, the state version of manifest disregard allows vacatur only for disregard of the law in violation of public policy,²⁹ whereas the United States Court of Appeals for the Second Circuit's manifest disregard standard as used by the *Sawtelle* court is slightly broader.³⁰

Conversely, if a state court has adopted a broader test of manifest disregard than the federal court in that circuit, then the application of the

26. While every circuit has adopted the manifest disregard test, some circuits interpret this standard far more strictly than others. Compare *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 762 (5th Cir. 1999) (permitting vacatur for manifest disregard only for awards that "would result in significant injustice"), and *Geo. Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2000) (allowing vacatur for manifest disregard only when an award directs the parties to violate the law), with *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) (defining manifest disregard test to be when the relevant law is clearly defined and not subject to reasonable debate, and the arbitrators consciously chose not to apply it). See generally Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 CINN. L. REV. 415 (2004).

27. The Eighth Circuit permits vacatur for manifest disregard "where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Gas Aggregation Servs., Inc. v. Howard*, 319 F.3d 1060, 1069 (8th Cir. 2003).

28. See *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 794-95 (Mo. Ct. App. 1998) (citing *Stifel, Nicolaus & Co. v. Francis*, 872 S.W.2d 484 (Mo. Ct. App. 1994), as rejecting manifest disregard as ground for vacatur in Missouri). The *Schwartz* court stated the test to be where the "arbitrators correctly understood and correctly stated the law but proceeded to ignore it." *Id.* at 795. The court confirmed the award on the merits.

29. See *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95 (N.Y. 1995).

30. The Second Circuit allows vacatur when (1) "the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators," (2) "once it is determined that the law [was] clear and plainly applicable, . . . the law was in fact improperly applied, leading to an erroneous outcome," and (3) "once the first two inquiries [were] satisfied," the arbitrator subjectively knew of the law's existence and its applicability to the problem. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389-90 (2d Cir. 2003).

federal manifest disregard standard would defeat the state's decision to accord broader review to awards.³¹ This is the scenario in Illinois, where the state courts permit review for manifest disregard when the arbitrators "deliberately disregarded what they knew to be the law,"³² whereas the United States Court of Appeals for the Seventh Circuit permits review only when the award directs the parties to violate the law.³³ Thus, an Illinois state court's improper application of the federal standard of review on preemption grounds can have serious consequences for the parties.

This Article will examine the state courts' approach to FAA preemption on a vacatur motion since the most recent Supreme Court FAA preemption decisions.³⁴ This Article will demonstrate that, with little or no analysis, state courts over-apply the FAA to commercial arbitration awards,³⁵ particularly the "manifest disregard" prong, causing what I call "over-preemption" and frustrating their own state's interests in the application of its arbitration law. Part II of this Article will briefly review Supreme Court FAA preemption jurisprudence. Part III of this Article will use illustrative state court decisions to demonstrate that the state courts are applying FAA preemption in the vacatur context in an inconsistent manner and thus over-preempt the FAA. Part IV of this Article will show that, even after balancing the competing policy concerns of federalism and judicial uniformity, this "over-preemption" is not required under the Supreme Court's jurisprudence and that only in very limited circumstances must a state court apply the grounds for vacatur set forth in section 10 of the FAA. Part IV will also demonstrate that state courts need not apply the "manifest disregard" prong as part of the FAA, even if the FAA were held to apply. Part V will conclude by

31. If a state statute provides such broad grounds for vacatur as to amount to a de novo appellate review of the merits, then the statute arguably undermines the purpose of the FAA to ensure the enforceability and finality of arbitration awards. This argument is addressed *infra* notes 171-72 and accompanying text.

32. *Quick & Reilly, Inc. v. Zielinski*, 713 N.E.2d 739, 743 (Ill. App. Ct. 1999).

33. *Geo. Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2000).

34. A close examination of federal courts' treatment of FAA preemption issues is beyond the scope of this Article because a federal court has far less occasion to consider applying a state arbitration statute to a motion to vacate in federal court and because section 10 of the FAA expressly applies in federal court. For the federal approach to whether to interpret a choice-of-law clause to include grounds for vacatur, see *infra* note 93 and accompanying text.

35. This Article will not cover cases involving labor arbitrations governed by Section 301 of the Labor Management Relations Act. 29 U.S.C. § 185(a).

setting forth a framework for state courts to use when considering what law applies to a motion to vacate that takes into account Supreme Court precedent and policy considerations.

II. OVERVIEW OF SUPREME COURT'S FAA PREEMPTION DOCTRINE³⁶

The Supreme Court has consistently announced that the FAA, enacted in 1925 “to overrule the judiciary’s long-standing refusal to enforce agreements to arbitrate,”³⁷ reflects a strong federal policy favoring arbitration.³⁸ In light of that policy, the Court views the FAA as “creat[ing] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”³⁹ The Court has further explained arbitrability in this context to mean “the duty to honor an agreement to arbitrate.”⁴⁰

By its terms, the FAA governs agreements to arbitrate involving “transactions in commerce.”⁴¹ The Court has interpreted this phrase very broadly to include any transaction that *in fact* involves interstate commerce, even if the parties did not anticipate an interstate impact.⁴² Thus, the FAA applies to virtually every judicial decision arising out of an arbitration agreement.⁴³

36. For general background on the preemption doctrine, see Susan Raeker-Jordan, *The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998). For a more detailed review of the Court’s modern commercial arbitration decisions, see Stephen L. Hayford, *Commercial Arbitration In The Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1995).

37. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

38. See, e.g., *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (recognizing a “liberal federal policy favoring arbitration agreements”).

39. *Id.* at 24.

40. *Id.* at 25 n.32.

41. 9 U.S.C. § 2 (2003).

42. See *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (2003) (per curiam) (applying FAA to debt restructuring agreements as “involving commerce”); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (applying FAA to securities arbitrations); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74, 281 (1995) (interpreting the reach of the FAA broadly to all transactions “involving commerce” and stating that “‘involving’ is broad and is indeed the functional equivalent of ‘affecting’”).

43. MACNEIL, *supra* note 23, § 9.5.3 (asserting that courts should assume that all arbitrations are covered by the FAA unless a party shows otherwise).

A. Conflict Preemption

It is also clear, however, that the "FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."⁴⁴ In other words, state arbitration laws have *some* role in judicial decision-making arising out of an arbitration. As a result, the Supreme Court has established the doctrine of FAA preemption: the FAA preempts a state law that "actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"⁴⁵ And, the Court has analyzed the history of the FAA and concluded that its primary purpose was to "require[] courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."⁴⁶ "Conflict preemption"⁴⁷ also means that if a state law is consistent with the policies and purposes of the FAA, that is, it does not undermine the enforceability of the arbitration agreement, then the FAA does not displace applicable state law.⁴⁸ Thus, in the

44. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

45. *Id.* at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Court has identified three circumstances under which the Supremacy Clause (U.S. CONST. art. VI, cl. 2) preempts state law: (1) when Congress has, in its statutory language, made explicit its intent to preempt state law, (2) when a state law regulates conduct in a field that Congress intended federal law to govern exclusively ("field preemption"), and (3) when state law actually conflicts with federal law ("conflict preemption"). *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). The *Volt* Court's quotation from *Hines* indicates that FAA preemption is a species of conflict preemption.

46. *Id.* at 478. This would remedy the historical judicial hostility to enforcing arbitration agreements.

47. For a fuller explanation of conflict preemption, see generally Patricia L. Donze, *Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 239, 246-55 (2000-01); see also Hayford & Palmiter, *supra* note 15, at 198 n.113 (discussing FAA preemption as a type of conflict preemption).

48. Justice Stevens' concurring opinion in *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), expresses this view. *Id.* at 2408 (Stevens, J., concurring). He would have voted to affirm the judgment of the Supreme Court of South Carolina because the application of South Carolina law, as agreed to by the parties to the arbitration agreement, does not conflict with the FAA. *Id.*; see also *Eckstrom v. Value Health Inc.*, 68 F.3d 1391, 1393 (D.C. Cir. 1995) (refusing to preempt Connecticut statute providing time limit on filing of motion to vacate, where parties' arbitration agreement contained a Connecticut choice of law clause, because application of statute furthered pro-arbitration policies).

absence of a conflict between state law and the FAA, courts need not reach the preemption issue.

In *Southland Corp. v. Keating*,⁴⁹ the Court expressly held that the FAA preemption doctrine applies in state court as well as federal court. In *Southland*, the California Supreme Court had held that a provision of the California Franchise Investment Law that required judicial, not arbitral, resolution of claims brought under the statute was not preempted by the FAA.⁵⁰ The Supreme Court reversed, holding that the state provision contradicted FAA section 2, which declares arbitration agreements irrevocable and enforces the parties' agreements according to their terms.⁵¹ Thus, *Southland* represents the Supreme Court's first explicit application of FAA preemption to a decision from a state court⁵² and the first occasion where the Court explicitly prevented a state court from applying its own state law because it conflicted with the FAA.⁵³

Agreeing with Justice O'Connor's strong dissent in *Southland*,⁵⁴ some scholars have assailed the majority opinion as based on an inaccurate interpretation of Congress's intent in enacting the FAA.⁵⁵ Similarly, Justice Thomas's dissent in *Allied-Bruce Terminix Cos. v. Dobson*⁵⁶ strenuously argued that the FAA does not apply in state court and that *Southland* was wrongly decided and should be overruled.⁵⁷ While this "barrage of criticism"⁵⁸ initially cast some doubt on the continued vitality and expansion of the preemption doctrine, other

49. 465 U.S. 1 (1984).

50. *Id.* at 5.

51. *Id.* at 10.

52. The *Southland* Court noted that it had already stated in *Moses H. Cone* that "[f]ederal law in the terms of the Arbitration Act governs that issue in either state or federal court." *Id.* at 13 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). However, it had never expressly held a state law to be preempted.

53. *Id.* at 12-16.

54. *Id.* at 21-36 (O'Connor, J., dissenting).

55. The primary proponent of this view is Professor Ian Macneil. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 139-47 (Oxford Univ. Press 1992); see also Hayford & Palmiter, *supra* note 15, at 189-92.

56. 513 U.S. 265, 285-297 (1995) (Thomas, J., dissenting) (joined by Justice Scalia).

57. Justice Thomas reiterated this view in his lone dissents in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), and *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003).

58. Hayfold & Palmiter, *supra* note 15, at 178 n.10.

scholars have defended the *Southland* decision.⁵⁹ In 1995, the Court expressly rejected parties' arguments urging the Court to overturn its *Southland* decision.⁶⁰ More recent Supreme Court arbitration decisions do not even acknowledge litigants' attacks on *Southland*.⁶¹ Thus, FAA preemption appears here to stay.

Since *Southland*, the Court has ruled on four occasions that the FAA preempts a state law.⁶² Professors Stephen L. Hayford and Alan R. Palmiter astutely recognize that none of these decisions actually preempting state law involve state *arbitration* law—laws that almost uniformly further a pro-arbitration policy.⁶³ Rather, the Court has preempted state laws on non-arbitration matters that contain “lingering anti-arbitration sentiment.”⁶⁴ For example, in *Perry*,⁶⁵ the Court preempted a provision of the California Labor Law which provided that wage collection actions could be pursued in state court, regardless of the existence of an arbitration agreement.⁶⁶ Similarly, in *Casarotto*, the

59. E.g., Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002); Margaret Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 460-68 (1998) (while agreeing that the decision was “contrary to the bulk of the legislative history,” nonetheless arguing that the decision was defensible on policy grounds).

60. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

61. See *Bazzele*, 123 S. Ct. at 2411; *Citizens Bank v. Alafabco., Inc.*, 123 S. Ct. 2037 (2003) (per curiam). In *Bazzele*, a case about the availability of class-wide arbitration, like in preceding Supreme Court arbitration cases, numerous amici briefs were filed attacking the foundations of the preemption doctrine. Commentators predicted the Supreme Court granted certiorari in the case to provide a vehicle to limit or abdicate the FAA preemption doctrine. See, e.g., Justin Kelly, *Professors Urge Supreme Court to Overturn Southland Decision*, ADRworld.com (March 25, 2003), available at <http://www.adrworld.com> (last visited September 23, 2003). Those predictions were unfounded, as the plurality opinion did not mention preemption.

62. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (Montana statute requiring specific type of notice in contract containing arbitration clause); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (New York law precluding arbitrators from awarding punitive damages); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (Alabama statute invalidating pre-dispute arbitration agreements in consumer contracts); *Perry v. Thomas*, 482 U.S. 483 (1987) (California statute requiring wage collection actions to be resolved in court).

63. Hayford & Palmiter, *supra* note 15, at 195.

64. *Id.*

65. 482 U.S. 483 (1987).

66. *Id.* at 490.

Court held that the FAA preempted a Montana statute requiring that, to be enforceable, an arbitration agreement must provide a very specific notice (typed in underlined capital letters on the first page) that it is subject to arbitration.⁶⁷ Because this notice requirement applied only to arbitration agreements and not contracts generally, the law singled out arbitration agreements for hostile treatment and was displaced by the FAA.⁶⁸

B. Choice of Law Clause Exception

The other two decisions since *Southland* preempting state laws explore the scope of FAA preemption and carve out another exception to the FAA preemption doctrine. Faced with a challenge to a state court's ruling that a state procedural rule did not have to yield to a conflicting provision in the FAA, the Court established that the parties can avoid the application of the FAA through a choice-of-law clause included in their pre-dispute arbitration agreement in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.⁶⁹

In *Volt*, the parties had entered into a construction contract. The contract required the parties to arbitrate any disputes arising out of it and contained a choice-of-law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located"—i.e., California law.⁷⁰ Under the contract in *Volt*, after one party to the contract filed for arbitration, the other party invoked in a California state court a provision under the California Arbitration Act that allowed a party to make a motion to stay an arbitration proceeding pending resolution of a related litigation proceeding between a party to the arbitration agreement and third parties not bound by it.⁷¹ The California court's ruling on the stay motion, while recognizing the general applicability of the FAA to the contract because it involved interstate commerce, interpreted the parties' arbitration agreement to incorporate the California rules of arbitration and held them not preempted by the FAA.⁷²

67. *Casarotto*, 517 U.S. at 683-89. For a detailed discussion of the background and subsequent history of *Casarotto*, see Harding, *supra* note 59, at 405-25.

68. *Casarotto*, 517 U.S. at 687.

69. 489 U.S. 468 (1989).

70. *Id.* at 470 (quoting the parties' construction contract).

71. CAL. CIV. PROC. CODE ANN. § 1281.2(c) (1989).

72. *Volt*, 489 U.S. at 471-72.

The Court agreed, holding that section 4 of the FAA—authorizing a party to an arbitration agreement to “petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement”⁷³—did not pre-empt the California statute. The Court reasoned that “application of [the California statute] to stay arbitration under [the construction contract] would [not] undermine the goals and policies of the FAA.”⁷⁴ The Court noted that the FAA does not prevent “the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself” and thus parties to arbitration agreements can “specify by contract the rules under which that arbitration will be conducted.”⁷⁵ Accordingly, “[w]here . . . parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.”⁷⁶

The Court’s 1995 decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*⁷⁷ applied the FAA preemption doctrine to a securities arbitration claim by a brokerage firm customer where the customer agreement contained a New York choice-of-law clause. In that case, customers brought an arbitration proceeding against a brokerage firm for mishandling their account. After a hearing, the panel awarded the customers compensatory and punitive damages. The firm moved to vacate the award of punitive damages in the United States District Court for the Northern District of Illinois, arguing that the parties’ generic New York choice of law clause incorporated New York’s *Garrity* rule that prohibited arbitrators from awarding punitive damages.⁷⁸ The district court granted the motion and the Seventh Circuit affirmed.⁷⁹

The Court reversed, ruling that the FAA preempted the *Garrity* rule. The Court found that the parties’ choice-of-law clause was ambiguous and did not expressly incorporate the New York rule precluding the award of punitive damages in arbitration. When a clause is ambiguous, the Court reasoned, “due regard must be given to the federal policy

73. 9 U.S.C. § 4 (2003).

74. *Volt*, 489 U.S. at 477-78.

75. *Id.* at 479.

76. *Id.*

77. 514 U.S. 52 (1995).

78. *Id.* at 54-55 (citing *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354 (1976)).

79. *Id.* at 54.

favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.”⁸⁰

To distinguish this case from *Volt*, the Court highlighted the difference in the procedural posture of the case: the Court was reviewing the Seventh Circuit’s (i.e., a *federal* court’s) interpretation of the parties’ contract, rather than a state court’s interpretation of a contract under its state contract rules, as in *Volt*—an interpretation to which the Court gave deference.⁸¹ *Mastrobuono* thus illustrates the difference in outcome on an issue of FAA preemption for a case that reached the Supreme Court from a federal circuit court rather than from a state’s highest court. This distinction is significant for state courts as it permits them to interpret under their own state’s rules of contract interpretation—without regard for the FAA—whether the parties’ choice of law clause included the standards of judicial review of an award or not.

C. Preemption of State Procedural Rules.

Volt and *Mastrobuono* express the Supreme Court’s current approach to FAA preemption. These decisions, seemingly in conflict, have fueled further the state courts’ difficulties in interpreting the FAA preemption doctrine.⁸² Commentators also have difficulty reconciling the two cases, as their results seem contradictory.⁸³ One scholar has critiqued the *Mastrobuono* Court’s distinction of *Volt* as encouraging forum-shopping—as it suggests that the *Mastrobuono* approach applies only when a federal court is interpreting a choice-of-law clause.⁸⁴

An alternative, more plausible distinction is that *Volt* involved the preemption of a state *procedural* rule under the California arbitration statute whereas *Mastrobuono* involved preemption of a *substantive* principle of New York law—the rule that arbitrators cannot award punitive damages.⁸⁵ And the precise procedural rule at issue in *Volt* was one favoring the use of arbitration as a dispute resolution process

80. *Id.* at 62 (quoting *Volt*, 489 U.S. at 476).

81. *Id.* at 60 n.4.

82. See Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250 (2002).

83. See, e.g., Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect upon the Federal Arbitration Act: Reconciling the Supreme Court with Itself*, 39 ARIZ. L. REV. 35, 56-58 (1997).

84. *Id.*

85. *Id.* at 61 (“If a state rule of arbitration procedure is implicated, *Volt* applies. If a state rule of arbitration substance is implicated, *Mastrobuono* applies.”).

whereas *Mastrobuono* involved a state law “reflect[ing] the ‘ancient judicial hostility to arbitration.’”⁸⁶ Language in subsequent Supreme Court opinions supports this distinction.⁸⁷

As a result, while there is widespread consensus that the FAA preempts substantive state laws that conflict with the substantive provisions of the FAA,⁸⁸ there is far less agreement on the scope of FAA preemption of state procedural rules and the corollary issue of whether the procedural provisions of the FAA apply in state court.⁸⁹ Equally unsettled is what rules can be classified as procedural rather than substantive.⁹⁰

In federal court, the issue arises only if the parties’ arbitration agreement includes a choice-of-law clause designating a state’s law. If the clause specifically prescribes that a state’s *arbitration* law applies, then the court should honor the unambiguous intent of the parties. In contrast, if the clause simply requires that a state’s law governs disputes arising out of the underlying contract, or other similarly generic language, then it is more problematic for the court to ascertain the

86. Hayford & Palmiter, *supra* note 15, at 199 (quoting *Mastrobuono*, 514 U.S. at 56).

87. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (noting that *Volt* involved a state procedural rule that determined “only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself”).

88. Hayford & Palmiter, *supra* note 15, at 194-95 (identifying “preemptive core”—substantive state laws that “invalidate arbitration agreements or limit the matters that can be arbitrated” as clearly preempted by the FAA); Harding, *supra* note 59, at 468-72 (collecting cases).

89. Professor MacNeil argues that the FAA should govern arbitration exclusively and that there should be no role for state arbitration law in arbitrations governed by the FAA. MACNEIL, *supra* note 23, § 10.8.2.2. He asserts that FAA exclusivity would (1) “avoid courts’ mistakenly allowing state arbitration law to limit or obstruct the FAA”; (2) simplify the landscape of arbitration law; (3) avoid confusion in cases involving both federal and state law claims; and (4) preclude the risk that state and federal courts would develop different FAA arbitration law, as state courts would draw on the FAA only to fill gaps in coverage. He also recognizes, however, that FAA exclusivity is not the current state of the law and that there is some, albeit confused, role for state arbitration law in FAA arbitrations, as long as it does not undermine the FAA’s goals and policies. *Id.* § 10.8.2.3.

90. Professor Diamond notes that “[s]tate rules that prescribe the manner in which arbitration is to be conducted are procedural” and that “[s]tate rules that limit arbitrators’ authority by denying them the power to resolve a particular dispute or grant a particular remedy are substantive.” Diamond, *supra* note 83, at 61-62.

parties' intent when they included that boilerplate clause.⁹¹

One could argue that the parties' generic choice-of-law clause includes a choice for the state's arbitration law as well as its substantive law. Federal courts, however, generally do not interpret a choice-of-law clause to include a state procedural rule, including a procedural rule governing the arbitration process.⁹² Indeed, most federal courts addressing this issue have concluded that a generic state choice-of-law clause does not incorporate a choice for that state's vacatur grounds.⁹³

Before *Mastrobuono* or even *Volt*, numerous state courts had interpreted *Southland* to mean that state procedural rules were *not* preempted.⁹⁴ Applying *Volt*, one court held specifically that the FAA

91. See Charles Davant IV, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 523 (2001) (arguing that federal courts improperly "invent" and apply a federal common law of contract instead of state law of contract on threshold question of arbitrability).

92. See *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1182 (S.D. Cal. 2002) ("A general choice-of-law clause will only be construed as incorporating state substantive laws, NOT state procedural laws."); *Jeereddi A. Prasad, M.D., Inc. Ret. Plan Trust Profit Sharing Plan v. Investors Assocs., Inc.*, 82 F. Supp. 2d 365 (D.N.J. 2000) (ruling that generic choice of law clause does not incorporate state statute of limitations for filing a motion to vacate). *But see* *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322 (2d Cir. 2004) (following *Volt* and construing generic California choice-of-law clause to incorporate a provision of California arbitration law deemed to be procedural).

93. See *Sovak, M.D. v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270, *amended by* 289 F.3d 615 (9th Cir. 2002) (stating "a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration"); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001) (crafting a default rule that if the parties' choice-of-law clause does not indicate parties' intent to opt out of FAA, then FAA rules apply); *AT&T Co. v. United Computer Sys., Inc.*, No. 99-56846, 2001 WL 389451, 7 Fed. Appx. 784, 787 (9th Cir. Feb. 7, 2001) (stating that FAA, not New Jersey law, provides grounds for vacatur motion because such grounds "affects the allocation of authority between courts and arbitrators"); *Jacada (Europe) Ltd. v. Int'l Mktg. Strategies, Inc.*, 255 F. Supp. 2d 744 (W.D. Mich. 2003). *But see* *Int'l Techs. Integration, Inc. v. The Palestine Liberation Org.*, 66 F. Supp. 2d 3, 9-10 (D.D.C. 1999) (applying Virginia grounds to a motion to vacate where arbitration agreement contained generic Virginia choice-of-law clause).

94. See, e.g., *Belmont Constructors, Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d 352, 355 (Tex. Ct. App. 1995) (stating that "federal procedure does not apply in Texas courts, even when Texas courts apply the [FAA]"); *Marr v. Smith Barney, Harris, Upham & Co.*, 842 P.2d 801 (Or. Ct. App. 1992) (holding that FAA does not preempt Oregon law precluding interlocutory appeal from order compelling arbitration); *McClellan v. Barrath Constr. Co.*, 725 S.W.2d 656, 658

does not preempt state vacatur law, because “[t]he state statute does not obstruct the congressional purposes and objectives.”⁹⁵ Since *Volt* and *Mastrobuono*, many state courts have continued to hold that the FAA does not preempt state procedural rules, as long as those rules do not defeat the substantive right to arbitration granted by the FAA.⁹⁶ These courts have thus applied state arbitration rules regarding procedural matters to arbitrations governed by the FAA, even where the FAA has a provision addressing that procedure—including FAA sections 4 (right to a jury trial on motion to compel),⁹⁷ 12 (service of process of notice of

(Mo. Ct. App. 1987) (stating that “the procedural provisions of the [FAA] are not binding on state courts”); cf. *Baxter Health Care, Corp., v. Harvard Apparatus, Inc.*, 617 N.E.2d 1018, 1020 n.2 (Mass. App. Ct. 1993) (holding that FAA does not preempt Massachusetts arbitration law that does not effect the validity or enforceability of the arbitration clause).

95. *DeBaker v. Shah*, 522 N.W.2d 268, 271 (Wis. Ct. App. 1994) (noting that Wisconsin grounds for vacatur and FAA “mirror each other” and are “nearly identical”). Professor MacNeil harshly criticizes this opinion as “wrong,” claiming the Wisconsin Court of Appeals should have considered the possibility that the state grounds could have been different from those of the FAA. MACNEIL, *supra* note 23, §10.8.2.

96. E.g., *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620 (Md. 2001) (collecting cases and holding that FAA does not preempt procedural state arbitration laws unless they discriminate against arbitration); *Collins v. Prudential Ins. Co.*, 752 So. 2d 825, 828-29 (La. 2000) (“[S]tates are free to follow their own procedural rules regarding appeals, unless those rules undermine the goals and principles of the FAA.”); *S. Cal. Edison Co of Am. v. Peabody W. Coal Co.*, 977 P.2d 769 (Ariz. 1999) (same); *Superpumper, Inc. v. Nerland Oil, Inc.*, 582 N.W.2d 647, 651 (N.D. 1998) (stating that “a state is not obligated to altogether ignore its own procedural requirements in light of the procedural aspects of the FAA, provided the state-enacted procedure does not defeat the rights granted by Congress”); *Weston Secs. Corp. v. Aykanian*, 703 N.E.2d 1185 (Mass. App. Ct. 1998); *Manson v. Dain Bosworth Inc.*, 623 N.W.2d 610, 614 (Minn. Ct. App. 1998) (holding that FAA governs arbitrability of dispute and Minnesota law governs all other issues, including procedural ones); *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 203 (Mo. Ct. App. 1996) (“Our courts are not bound by the procedural provisions of the FAA and state procedural rules may be applied when arbitration is pursuant to the FAA.”); see also Suzanne H. Johnson, Note, *FAA Pre-emption: When Should Conflicting State Law Be Pre-Empted by the FAA?*, 1999 J. DISP. RESOL. 191 (analyzing *Weston* and concluding that court reached correct result by holding that FAA does not automatically preempt conflicting state procedural rules governing arbitration as long as they do not defeat the substantive body of law under the FAA).

97. *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061 (Cal. 1996) (ruling that FAA section 4 did not preempt California rule permitting use of a summary procedure on a motion to compel arbitration).

motion to vacate)⁹⁸ and 16 (appeals).⁹⁹ Other courts hold that the FAA's procedural provisions preempt state procedural rules.¹⁰⁰ These decisions are difficult to reconcile across state lines.

III. STATE COURTS' INCONSISTENT USE OF FAA PREEMPTION OF VACATUR MOTIONS

As discussed above, since *Volt* and *Mastrobuono*, state courts have been grappling with the scope of FAA preemption of state procedural rules and have applied the doctrine in a confusing and inconsistent manner. This section of the Article explores examples of this confusion and inconsistency in several illustrative states—New York, Florida, Georgia, Illinois, Texas and California¹⁰¹—in one procedural context only: vacatur motions and the grounds applicable to such a motion.¹⁰²

98. *Manson*, 623 N.W.2d at 613 (holding that state civil procedural rule requiring personal service of motion to vacate was not preempted by FAA section 12 permitting service by mail).

99. *Wells*, 768 A.2d at 625 (holding state appellate procedural rule deeming an order compelling arbitration to be a final and appealable judgment was not preempted by FAA section 16 governing appeals under the FAA); *Collins*, 752 So. 2d at 828-30 (ruling that section 16 did not preempt Louisiana rule precluding immediate appeal from order compelling arbitration); *Weston Secs. Corp.*, 703 N.E.2d at 1188-90 (holding that FAA does not preempt Massachusetts arbitration statute's provision that did not permit an immediate appeal from an order compelling arbitration).

100. 1745 *Wazee L.L.C. v. Castle Builders Inc.*, Nos. 01CA2560, 02CA0303, 2003 WL 21665020 (Colo. Ct. App. July 17, 2003); *Waverlee Homes v. McMichael*, 855 So. 2d 493 (Ala. 2003) (applying FAA standards to motion to vacate without discussion of preemption); *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 795 (Mo. Ct. App. 1998).

101. I chose these states because of the frequency of arbitration in them, the volume of arbitration decisions, the presence of a commercial center in the state, and to represent a cross-section of geographic regions in the country and states within different circuits. I referenced opinions from other states where they mirrored opinions in the illustrative state.

102. This section of the Article will not consider cases where the FAA arguably applied yet the state court did not consider the applicability of the FAA and thus assumed state law vacatur grounds controlled. *E.g.*, *Boyhan v. Maguire*, 693 So. 2d 659, 663 (Fla. Dist. Ct. App. 1997) (applying state law vacatur grounds to dispute arising out of royalty agreement for services performed in another state); *see also* MACNEIL, *supra* note 23, § 9.5.4 (stating that "[s]tate courts often . . . seem happily unaware that the FAA governs cases before them and apply state law (footnotes omitted)). Additionally, this section will focus on cases decided after *Mastrobuono*, as that decision, combined with *Volt*, altered the FAA preemption landscape.

Some state courts have declared that the FAA preempts all state vacatur laws wholesale;¹⁰³ others have narrowly limited the contexts in which it will find that the FAA preempts its own state laws.¹⁰⁴ Still other state courts frame their analysis around whether the parties' arbitration agreement includes a choice-of-law clause.¹⁰⁵

A. *New York*

Perhaps the clearest example of intrastate judicial inconsistency is in New York. In *Hackett v. Milbank, Tweed, Hadley & McCloy*,¹⁰⁶ the Court of Appeals addressed FAA preemption in the context of the parties' New York choice of law clause. In that case, a former partner in a law firm, invoking an arbitration clause in a partnership agreement, brought an arbitration proceeding against his former firm seeking payments allegedly owed to him following his departure from the partnership. After losing the arbitration, the partner moved to vacate the award, challenging the arbitrator's power.¹⁰⁷ The New York Supreme Court vacated the award on public policy grounds and the Appellate Division affirmed.¹⁰⁸

On appeal, the law firm contended that the FAA provided the grounds for vacatur. The Court of Appeals disagreed, and ruled that the state law grounds for vacatur under N.Y. CPLR section 7511 governed

103. *E.g.*, *Carpenter v. Brooks*, 534 S.E.2d 641, 645 (N.C. Ct. App. 2000) (applying FAA grounds to motion to vacate without analysis of scope of preemption); *Groceman v. Pulte Homes Corp.*, 53 S.W.3d 599, 601 n.2 (Mo. Ct. App. 2001) (holding that FAA grounds apply to all vacatur motions involving arbitrations where FAA applies).

104. *E.g.*, *Tim Huey Corp. v. Global Boiler & Mech., Inc.*, 649 N.E.2d 1358, 1361-62 (Ill. App. Ct. 1995) (applying Illinois vacatur statute because the FAA only preempts conflicting state law and parties' contractual choice of Texas law, which is identical to Illinois law, should be enforced under *Volt*).

105. *See, e.g.*, *First Mich. Corp. v. Mansour*, No. 228521, 2002 WL 1011771 (Mich. App. May 17, 2002) (applying FAA grounds where PDAA designated FAA and New York law as governing); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95 (1995) (New York choice-of-law clause); *cf. Harding*, *supra* note 59, at 409 n.73 and accompanying text (asserting that state courts faced with a choice-of-law clause must determine whether the parties intended to incorporate that state's arbitration law as well as substantive law).

106. 654 N.E.2d 95 (1995).

107. *Id.* at 97-100.

108. *Id.* at 97.

the dispute.¹⁰⁹ First, the court recognized that, while the FAA generally governed the partnership agreement, the parties' New York choice of law clause in the agreement displaced the FAA.¹¹⁰ Second, the court noted that the choice of law clause explicitly provided that the only grounds for vacating an award were those specified in CPLR sections 7509 and 7511.¹¹¹ Thus, the Court of Appeals honored and gave effect to the parties' "explicit and unambiguous choice of law" under *Volt*.¹¹² *Hackett* left unsettled the issue of what law would govern in New York where the arbitration agreement contained a generic choice of law clause.

Following *Hackett*, the lower courts in New York have inconsistently used the FAA preemption doctrine to preempt state statutory grounds governing motions to vacate. Thus, lower courts in New York apply the FAA grounds (1) where the parties' arbitration agreement does not contain a choice of law clause;¹¹³ (2) without discussion of a choice of law clause;¹¹⁴ and (3) even where the parties chose a state law to govern.¹¹⁵

109. *Id.* at 100. CPLR section 7511 provides that, for a party who participated in or received notice of the arbitration, an award "shall be vacated . . . if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of [Article 75], unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." CPLR § 7511(b)(1). Additional grounds exist for those who neither participated in nor received notice of the arbitration. CPLR § 7511 (b)(2). The *Hackett* court held that any other ground not listed in the statute is precluded, including manifest disregard, unless such disregard is "'totally irrational or violative of a strong public policy' and thus in excess of the arbitrator's powers." *Hackett*, 654 N.E.2d at 100 (quoting *Maross Constr. v. Cent. N.Y. Reg'l Transp. Auth.*, 488 N.E.2d 67 (1985)).

110. In New York, only an explicit choice of law clause will displace the FAA. For example, parties' membership in the New York Stock Exchange and their agreement to arbitrate pursuant to its Constitution and Rules is not enough. *Salvano v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298, 1301 (N.Y. 1995).

111. *Hackett*, 654 N.E.2d at 100.

112. *Id.* On the merits, the court reversed the lower court's vacatur, ruling that the award should not have been vacated on public policy grounds. *Id.* at 100-02.

113. *E.g.*, *Halikia v. Warburg Dillon Read L.L.C.*, 759 N.Y.S.2d 288 (N.Y. Sup. Ct. 2000) (confirming NYSE arbitration award on FAA grounds in employment dispute).

114. *E.g.*, *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (N.Y. App. Div. 2003) (discussed *supra*, notes 6-8 and accompanying text) (stating that the FAA

Conversely, several recent vacatur decisions by lower courts in New York have—without a discussion of a choice of law clause—applied the CPLR grounds for vacatur to arbitration agreements governed by the FAA either (1) based on the parties' New York generic choice of law clause;¹¹⁶ or (2) without discussion of the preemption doctrine or a choice-of-law clause.¹¹⁷ There appears to be little explanation for the discrepancy.

governs employment disputes in the securities industry and vacating punitive damages portion of an award in favor of a former employee under section 10 of the FAA and “manifest disregard of the law” test); *Spear, Leeds & Kellogg v. Bullseye Secs., Inc.*, 738 N.Y.S.2d 27 (N.Y. App. Div. 2002) (vacating NASD award for manifest disregard of the law).

115. *In re Engel v. Refco, Inc.*, 746 N.Y.S.2d 826 (N.Y. Sup. Ct. 2002) (applying FAA to customer claim against futures trader in NFA arbitration where customer agreement specified Illinois law); *In re R.C. Layne Constr., Inc. v. Stratton Oakmont, Inc.*, 651 N.Y.S.2d 973 (N.Y. App. Div. 1996) (applying FAA grounds where parties designated New York law); *accord* *First of Mich. Corp. v. Mansour*, No. 228521, 2002 WL 1011771 (Mich. App. May 17, 2002) (per curiam) (applying FAA despite parties' choice of New York law); *Carpenter v. Brooks*, 534 S.E.2d 641, 645 (N.C. Ct. App. 2000) (applying FAA grounds regardless of parties' choice of law).

116. *See, e.g., In re Arbitration Between UBS Warburg L.L.C. and Auerbach, Pollak & Richardson, Inc.*, No. 119163/00, 2001 WL 1586978 (N.Y. Sup. Ct. Oct. 2, 2001), *aff'd*, 744 N.Y.S.2d 364 (N.Y. App. Div. 2002) (discussed *supra*, notes 12-14 and accompanying text) (vacating award in a securities dispute between brokerage firms and tersely noting that CPLR section 7511 governed the motion to vacate because the parties' arbitration agreement included a New York choice of law clause).

117. *Sands Bros. & Co. v. Generex Pharms., Inc.*, 749 N.Y.S.2d 17 (N.Y. App. Div. 2002) (discussed *supra* notes 9-11 and accompanying text); *In re Donald & Co. Secs., Inc. v. Jones*, 270 A.D.2d 56 (N.Y. App. Div. 2000) (brokerage customer dispute); *Markby v. Painewebber Inc.*, 650 N.Y.S.2d 950 (N.Y. Sup. Ct. 1996) (NYSE arbitration of broker's employment dispute); *Republic N.Y. Secs. Corp. v. Lloyd*, N.Y.L.J. 28, Oct. 27, 1997, at 28 (N.Y. Sup. Ct. 1997) (same); *Berman v. Stratton Oakmont, Inc.*, N.Y.L.J., Oct. 18, 1996, at 34 (N.Y. Sup. Ct. 1996). In *Sands*, the parties' agreement contained a generic New York choice-of-law clause, but it did not contain a pre-dispute arbitration clause. Rather, Sand Bros. was compelled to arbitrate the dispute because it was a New York Stock Exchange member. Thus, the parties could not have contemplated that its choice-of-law clause would include New York state arbitration law, as arbitration was not contemplated at the time the parties entered into their business arrangement. Telephone Interview with Richard Roth, Esq., Counsel for Sands Bros. (Sept. 29, 2003).

B. Texas

The Texas courts are also inconsistent in their application of FAA preemption to vacatur motions. The Supreme Court of Texas recently dodged the issue by invoking both the applicable FAA and Texas grounds of vacatur,¹¹⁸ which were identical, in an FAA-governed arbitration.¹¹⁹ The intermediate appellate courts apply the FAA grounds on the broad assumption that the FAA preempts all state arbitration law¹²⁰ or because the parties' generic choice of law clause was not explicit enough to include Texas vacatur law.¹²¹ Thus, these courts have over-preempted Texas vacatur law. Other courts apply the Texas Arbitration Act due to the parties' explicit choice of law clause along with a finding that Texas law does not conflict with the FAA,¹²² or due to a finding that vacatur motions are procedural and thus are always governed by state law.¹²³

C. Florida

Generally, without discussion of FAA preemption, Florida courts apply state law grounds¹²⁴ to a motion to vacate an arbitration award governed by the FAA.¹²⁵ One court applied FAA vacatur grounds,

118. TEX. CIV. PRACT. & REM. CODE ANN. § 171.008 (Vernon 2003).

119. *Mariner Fin. Group, Inc. v. H.G. Bossley*, 79 S.W.3d 30, 32 (Tex. 2002).

120. *E.g.*, *Thomas James Assoc., Inc. v. Owens*, 1 S.W.3d 315, 319 (Tex. App. 1999); *Thomas v. Prudential Secs., Inc.*, 921 S.W.2d 847 (Tex. App. 1996); *accord Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 856 (Tenn. Ct. App. 2001); *McKee v. Hendrix*, 816 So. 2d 30, 32 (Ala. Civ. App. 2001).

121. *Tanox, Inc. v. Akin, Gumo, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244 (Tex. App. 2003) (applying FAA including manifest disregard standard).

122. *Tuco, Inc. v. Burlington N. RR Co.*, 912 S.W.2d 311 (Tex. App. 1995), *modified on other grounds*, 960 S.W.2d 629 (Tex. 1997).

123. *J.D. Edwards World Solutions Co. v. Estes*, 91 S.W.3d 836, 839-40 (Tex. App. 2002).

124. FLA. STAT. ANN. § 682.13 (West 2003). Florida courts do not allow vacatur for grounds other than those set forth in the statute (arbitrator misconduct or procedural errors), and will not set aside an award for "mere errors of judgment either as to the law or as to the facts." *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327, 1328 (Fla. 1989).

125. *E.g.*, *Avatar Props., Inc. v. N.C.J. Inv.*, 848 So. 2d 1259 (Fla. Dist. Ct. App. 2003); *Soler v. Secondary Holdings, Inc.*, 832 So. 2d 893 (Fla. Dist. Ct. App. 2002); *Dadeland Square, Ltd. v. Gould*, 763 So. 2d 524 (Fla. Dist. Ct. App. 2000); *Flavio Dev. Corp. v. Laguna E. Club*, 756 So. 2d 186 (Fla. Dist. Ct. App. 2000). The leading case is *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143 (Fla. Dist. Ct. App. 2000), in which the court recognized, on the issue of the

however, noting only that “[t]he parties agree that federal law, not state law, governs evaluation of the substantive aspects of [movant’s] claims.”¹²⁶

D. Georgia

In apparent precise opposition to Florida courts, when Georgia courts acknowledge the application of the FAA, they conclude, without discussion of the scope of preemption, that the FAA grounds for vacatur, not the Georgia Arbitration Code,¹²⁷ apply to motions to vacate.¹²⁸ Thus, Georgia applies complete preemption, ignoring Georgia state law even if it does not conflict with the FAA. This represents another example of over-preemption.

E. Illinois

Illinois courts uniformly apply the Illinois Arbitration Act¹²⁹ to motions to vacate arbitration awards governed by the FAA.¹³⁰ These cases in large part do not analyze the intersection of *Volt* and *Mastrobuono*. Rather, they either cite to a conclusory decision of the

arbitrability of an attorney’s fees award, that the FAA preempts only inconsistent state law. With respect to vacatur grounds, however, the court did not discuss FAA preemption, but applied state law grounds without discussion.

126. *World Invest Corp. v. Breen*, 684 So. 2d 221, 222 n.1 (Fla. Dist. Ct. App. 1996). In support, the court cited a 1981 case as holding that the FAA “supersedes the Florida Arbitration Act where interstate commerce is involved.” *Id.* (citing *Merrill Lynch, Inc. v. Melamed*, 405 So. 2d 790 (Fla. Dist. Ct. App. 1981)). *Melamed* stated, however, that the FAA “supplants *inconsistent* state laws,” not the entire Florida Act without regard to its consistency with the FAA. *Id.* at 793 (emphasis added).

127. GA. CODE ANN. § 9-9-13 (2003).

128. *E.g.*, *Galindo v. Lanier Worldwide, Inc.*, 526 S.E.2d 141, 146 (Ga. Ct. App. 1999); *Hilliard v. J.C. Bradford & Co.*, 494 S.E.2d 38, 41 (Ga. Ct. App. 1997) (noting that parties had not agreed to the application of any state’s law). These courts both cite a pre-*Volt/Mastrobuono* Georgia case, *Hilton Construction Co. v. Martin Mechanical Contractors, Inc.*, 308 S.E.2d 830 (Ga. 1983), which ruled that the FAA applies to motions to vacate.

129. Grounds for vacating an arbitration award can be found in section 12 of Illinois’ Act. 710 ILL. COMP. ST. ANN. 5/12 (West 2003).

130. *E.g.*, *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 692 N.E.2d 1167, 1171 (Ill. 1998); *Quick & Reilly, Inc. v. Zielinski*, 713 N.E.2d 739, 742 & n.1 (Ill. App. Ct. 1999); *Ryan v. Kontrick*, 710 N.E.2d 11, 14 (Ill. App. Ct. 1999).

Supreme Court of Illinois that pre-dates *Mastrobuono*¹³¹ or do not even discuss the issue. Thus, while the Illinois courts reflect no inconsistency in their automatic application of state law grounds for vacatur, they also reveal no in-depth analysis of the scope of FAA preemption and thus are vulnerable to a preemption argument.¹³²

The one exception I have found to these general rules is the Illinois appellate court decision in *Tim Huey Corp. v. Global Boiler & Mechanical, Inc.*¹³³ In that case, the parties' arbitration agreement designated Texas law to govern disputes arising from their contract. The losing party moved to vacate the award in Illinois circuit court and cited grounds under the FAA, claiming the FAA preempted state law grounds. The Appellate Court disagreed, ruling that the FAA preempts only "conflicting State law."¹³⁴ The court also ruled that because the purpose of the FAA is to enforce the parties' arbitration agreements, and the parties designated Texas law, the Texas grounds for vacatur applied.¹³⁵ In acknowledging and ultimately rejecting the moving party's preemption claim, the *Tim Huey* court approaches the level of analysis required by the Supreme Court in *Volt* and *Mastrobuono*.

F. The Exception: California

In a comprehensive and well-reasoned opinion, a California appellate court has recognized the over-preemption and halted it in favor of California arbitration law. Thus, in *Siegel v. Prudential Insurance Co. of America*,¹³⁶ a former employee of a brokerage firm sued the firm and a supervisor for wrongful termination. After the panel awarded compensatory and punitive damages to the former employee, the

131. *Rauh v. Rockford Prods. Corp.*, 574 N.E.2d 636, 643 (Ill. 1991) (holding that Illinois Arbitration Act, not FAA, provides grounds for vacatur motion "[u]nder the [unspecified] circumstances of the instant case").

132. Since Illinois recognizes "manifest disregard" as a state law ground for vacatur, *Quick & Reilly*, 713 N.E.2d at 743, a preemption argument is significant, because the Seventh Circuit's interpretation of "manifest disregard" is extremely narrow. *Geo. Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2000).

133. 649 N.E.2d 1358 (Ill. App. Ct. 1995).

134. *Id.* at 1361.

135. *Id.* at 1362. Because neither party cited Texas vacatur cases in its brief, but cited only federal and Illinois cases, and because the court noted that Texas and Illinois grounds for vacatur were identical as derived from the Uniform Arbitration Act, the court cited Illinois cases in its decision. *Id.*

136. 79 Cal. Rptr. 2d 726 (Cal. Ct. App. 1998).

employee moved to confirm and the respondents cross-moved to vacate the award in superior court. The trial court confirmed the award and denied the cross-motion to vacate.¹³⁷ The respondents appealed on the grounds that, *inter alia*, the panel acted in manifest disregard of the law under the FAA.¹³⁸

The California appellate court, following a thorough analysis, concluded that the FAA did *not* preempt California arbitration law with respect to the standard of review of an arbitration award. In reaching this result, the court reasoned that:

1. “manifest disregard of the law” is not a recognized ground of vacatur in California;¹³⁹
2. “manifest disregard of the law” is not part of the FAA, but is a judicially-created ground of review independent of the FAA;¹⁴⁰
3. the language of section 10 on its face suggested it did not apply in state court;¹⁴¹
4. the FAA has only limited preemptive effect in state court when a state law undercuts the enforceability of an arbitration agreement;¹⁴² and
5. the California statute that prevents the review of the merits of an arbitration award does not contradict the purposes and policies of the FAA.¹⁴³

Thus, as opposed to section 10 of the FAA and the “manifest disregard of the law” standard, the court reviewed the arbitration award pursuant to the standards set forth in section 1286.2 of California’s Code of Civil Procedure, which did not allow review for manifest disregard of

137. *Id.* at 729.

138. *Id.* at 730.

139. *Id.* at 732.

140. *Id.* at 731.

141. *Id.* at 732.

142. *Id.* at 737.

143. *Id.* at 740; see also Paul Turner, *Preemption: The United States Arbitration Act, The Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts*, 26 PEPP. L. REV. 519 (1999) (written by author of Siegel opinion and mirroring, but not citing, Siegel opinion).

the law.¹⁴⁴ Accordingly, the court affirmed the trial court's denial of the motion to vacate.¹⁴⁵

While one intermediate appellate court in California appears to have thoroughly analyzed the intersection of current Supreme Court FAA preemption jurisprudence with grounds for vacating an arbitration award, most other states have addressed this issue in an inconsistent manner, with courts within the same state in conflict (e.g., New York; Texas) as well as courts in different states applying contradictory doctrines (e.g., California vs. Florida). This is significant where courts are vacating multi-million dollar awards and the choice of the applicable standard of review can affect the outcome.

IV. OVER-PREEMPTION OF VACATUR LAW FRUSTRATES STRONG PUBLIC POLICIES

The inconsistency among and within the states, which has resulted in over-preemption, raises several public policy concerns. The purpose of vacatur law is to enforce the parties' agreement to arbitrate by minimizing judicial intrusion into the dispute resolution process. Vacatur law attempts to balance the competing considerations of the arbitration parties' desire for finality, low cost, efficiency, and speed with the need for some limited review of the process to ensure fairness and to provide some minimal due process safeguards.¹⁴⁶ Because "[t]he standard of judicial review of arbitral awards defines the line between public justice and private justice,"¹⁴⁷ preemption in the vacatur context has implications for this public/private balance so finely drawn.

Over-preemption defeats the objective of uniformity of state arbitration laws, sought by the drafters of the Uniform Arbitration Act

144. The *Siegel* court did not mention the existence of a choice-of-law clause in the arbitration agreement, and, presumably, there was none. Under the court's analysis, the presence of a choice-of-law clause would not have altered the decision, unless the parties expressly chose the FAA to govern. Since *Siegel*, at least one court in California has ruled that a generic choice-of-law clause incorporated California procedural law, including a provision in conflict with the FAA. See *Mount Diablo Med. Ctr. v. Health Net of Cal., Inc.*, 124 Cal. Rptr. 2d 607 (Cal. Ct. App. 2002).

145. See also *Barker v. Vulcan Chem. Techs.*, No. C038586, 2002 WL 1788557 (Cal. Ct. App. Aug. 5, 2002) (following *Siegel* and applying California law, not FAA, to motion to vacate in state court).

146. See Hayford, *supra* note 18, at 740-44.

147. KATHERINE V. W. STONE, *ARBITRATION LAW* 481 (Found. Press 2003).

and Revised Uniform Arbitration Act.¹⁴⁸ To the extent that courts within one state are inconsistently applying the preemption doctrine to vacatur motions, litigants within that state have lost the predictability and rule of law that governs citizen conduct. Interestingly, the lack of predictability alleviates the risk of forum-shopping that could arise from the lack of judicial uniformity. Because parties cannot predict what the result will be even in courts within the same state, even at the same judicial level, then they will not shop for a different forum depending on their predicted results.

Additionally, and ironically, over-preemption of state vacatur law—in the name of avoiding conflict with the FAA—undermines the public policy reflected in the FAA to enforce the parties' agreement to arbitrate on its precise terms and in line with the parties' expectations. Those expectations include arbitration's principle characteristic of finality and the understanding that courts do not review the merits of the awards. To the contrary, narrow grounds of judicial review reflect the strong belief that parties to arbitration agreements are not permitted a second shot at a favorable outcome, even if they are dissatisfied with the arbitrators' decision.¹⁴⁹ This is particularly problematic in a jurisdiction where the applicable federal circuit's standard of review is broader than the state's within that circuit.¹⁵⁰ If the parties, via their arbitration agreement, expect state arbitration law to apply to the arbitral process, any over-preemption would frustrate these expectations by applying a potentially broader standard of review than contemplated.

In addition to the need for judicial uniformity and the respect of the parties' arbitration agreement, another public policy frustrated by over-preemption is judicial support of federalism. Scholars have recently returned to basics, articulating the reasons why respecting federalism is important to our democratic society and institutions.¹⁵¹ As described by Professor Barry Friedman, those "values of federalism" include increasing public participation in democracy, promoting accountability,

148. See NCCUSL Background, Website, Uniform Law Commissioners (announcing its purpose is to "draft proposals for uniform and model laws on subjects where uniformity is desirable and practicable"), available at <http://www.nccusl.org/nccusl/DesktopDefault.aspx?tabindex=0&tabid=1> (last visited April 8, 2004).

149. See Hayford, *supra* note 18, at 740-42. Any other result would transform arbitrators into a court lower on the hierarchy than trial courts, as the trial courts could then review the merits of the award for factual or legal errors.

150. Examples are provided *supra* notes 27-30 and accompanying text.

151. Massey, *supra* note 25; Friedman, *supra* note 25.

making states laboratories for experimentation, protecting citizens' health, safety, and welfare, enhancing cultural and local diversity, and diffusing power to protect liberty.¹⁵² Professor Calvin Massey has identified the values as the preservation of individual liberty, the desire to maximize the satisfaction of citizen preferences, experimentation and community, and the provision of political accountability by increasing citizen participation in democratic processes.¹⁵³ Significantly, Professor Massey stresses the judicial role in enforcing federalism, as opposed to the role of political institutions, arguing that "the Court's role is to make sure that the Constitution's elasticity of federalism is not lost by reckless and untoward stretching of the fabric."¹⁵⁴

State judicial over-preemption would be an unwarranted "stretching of the fabric." While the FAA has expanded dramatically in coverage since its passage, there is no reason it should eliminate state arbitration law entirely. Why shouldn't a state court be responsible for striking the appropriate balance between judicial review and arbitration finality? To the extent state courts are applying the FAA in circumstances where they do not need to, those courts are upsetting the balance of power created by our federalist system, by granting more power to the FAA than intended by either Congress or permitted by the Constitution.¹⁵⁵ To the extent that state courts are applying state law where the FAA should apply, those courts have abrogated Congress's purpose and intent in enacting the FAA and have limited its reach improperly. For all of these reasons, a coherent doctrine should be applied in all states to reflect the compromise between *Volt* and *Mastrobuono* and to respect the federalism concerns of states.

V. A FRAMEWORK TO REDUCE OVER-PREEMPTION

A. Section 10 of the FAA Does Not Apply In State Court

As the *Siegel* court has concluded, I have concluded that, unless the parties' arbitration agreement specifically designates the section 10

152. Friedman, *supra* note 25, at 386-404.

153. Massey, *supra* note 25, at 438-54.

154. *Id.* at 461.

155. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) (discussing constitutional basis of preemption). In my view, these concerns dwarf the concerns regarding the risk of forum-shopping. See *supra* notes 84 & 89 and accompanying text.

grounds as those governing a motion to vacate, or the state vacatur grounds are so broad as to convert vacatur from a procedural rule to a substantive re-allocation of authority to the courts, section 10 and the judicially-crafted "manifest disregard" standard do not apply in state courts. My conclusion emerges from the intersection of several principles.

First, this conclusion is consistent with principles of conflict preemption. The Supreme Court's preemption jurisprudence makes clear that the FAA preempts state law only "to the extent that it *actually conflicts* with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁵⁶ And, because "the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate [were] enforced according to their terms,'"¹⁵⁷ unless the parties designated applicable law, application of state law grounds for a vacatur motion does not conflict with the "body of federal substantive law of arbitrability"¹⁵⁸—a body of law which does not dictate the standards of review of an arbitration award.

Moreover, if the state law grounds for vacatur are as limited or more so than the grounds specified in the FAA, then state law should apply, even without a choice of law clause, because the state law does not conflict with the federal grounds.¹⁵⁹ There are strong public policy reasons to support a state court's application of its own state's arbitration rules. If a state's policy is expressed through a statute severely limiting the judiciary's role in upsetting the finality of an award, a court would further no FAA purpose by preempting such a law. States should be able to enforce their laws designed to ensure that arbitration is expeditious and final through strictly limited judicial review, without fear of FAA intrusion.¹⁶⁰

156. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (emphasis added).

157. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (citing *Volt*, 489 U.S. at 479).

158. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

159. MACNEIL, *supra* note 23, § 10.9.2 (acknowledging that a state arbitration law more favorable to arbitration than the FAA gives rise to no pre-emption objection).

160. This argument is also consistent with Professors Hayford & Palmiter's arbitration federalism blueprint. As they write, "[i]f the state provision is not hostile to arbitration—but seeks to rationalize the arbitral process by making it more

Finally, if the parties did designate a particular law to apply, then, unless a court construes that choice of law to preclude grounds for a vacatur motion, the court should honor that choice and apply the chosen law—whether it be state or federal. The FAA preemption doctrine could possibly preclude application of that state’s vacatur law only if that law provides grounds broader than those allowed under the FAA.¹⁶¹

A second principle supporting my conclusion is that the precise language of section 10 strongly suggests it applies only in federal court. Thus, FAA section 10(a) provides that “the *United States court* in and for the *district* wherein the award was made may make an order vacating the award upon application of any party to the arbitration.”¹⁶² The plain meaning of the statute suggests that section 10 is limited to application in federal district courts.¹⁶³ Also, general principles of statutory interpretation dictate that the plain meaning of a statute prevails even before the duty of interpretation arises.¹⁶⁴

The Supreme Court, in *dicta*, has supported this analysis. For example, in *Volt*, the Court suggests that FAA sections containing language appearing to limit them to federal court mean they are limited to federal court:

While we have held that the FAA’s “substantive” provisions—§§ 1 and 2—are applicable in state and federal court, we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, see 9 U.S.C. § 3 (referring to proceedings “brought in any of the courts of the United States”); § 4 (referring to “any United States district court”), are nonetheless applicable in state court¹⁶⁵

Thus, the Supreme Court considers the language of the statute referring to federal court to be indicative of congressional intent not to have procedural sections of the FAA apply in state court.

expeditious, fair, or legitimate—the provision fits the blueprint.” Hayford & Palmiter, *supra* note 15, at 204.

161. See discussion *infra* notes 171-72 and accompanying text.

162. 9 U.S.C. § 10 (2003) (emphasis added).

163. Hayford & Palmiter, *supra* note 15, at 195.

164. *E.g.*, Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134-35 (2002).

165. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (citations omitted); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 289-90 (Thomas, J., dissenting) (noting language of FAA sections, including section 10, on their face apply only in federal district court).

A third principle supporting my conclusion is the fact that vacatur law is more aptly characterized as procedural, not substantive, in nature.¹⁶⁶ The federal law actually preempting conflicting state law is the substantive principle that parties' arbitration agreements should be enforced on equal footing as ordinary contracts. Vacatur law prescribes the very narrow grounds¹⁶⁷ on which a court will second-guess the arbitrators' decision. Vacatur does not challenge the determination that the parties had an enforceable arbitration agreement. Because vacatur is a courtroom procedure providing for limited judicial review of the arbitration process, preemption of rules limiting the enforcement and interpretation of a contract is inapposite.¹⁶⁸

Some courts have characterized the vacatur rules as substantive, not procedural.¹⁶⁹ These courts reason that, because judicial review of an arbitration award provides the courts with some oversight authority over the arbitrators, the standards of review affect the allocation of power between arbitrators and courts. This allocation of power goes to the heart of the effectiveness of arbitration as a dispute resolution process and, therefore, affects substantive rights of the disputants.¹⁷⁰

I would argue that the characterization of vacatur as substantive rather than procedural should be limited only to the situation where a state authorized a broad *de novo* review of an award. In this

166. *E.g.*, *Stulberg v. Intermedics Orthopedics, Inc.*, 997 F. Supp. 1060, 1063 (N.D. Ill. 1998) (holding that the applicable standard of judicial review is a procedural issue); *Atl. Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984) (stating that "there is nothing in the Federal Arbitration Act . . . remotely suggesting that the 'motion to vacate' procedure . . . has any application at all to such state action" and holding that "procedural aspects [of the FAA] are confined to federal cases").

167. Indeed, modern arbitration statutes preserve the notion that judicial review of arbitration awards should be strictly limited to support the strong policy favoring arbitration and to further the objectives of the parties to resolve their disputes quickly, inexpensively, and with finality. *See generally* MACNEIL, *supra* note 23, § 40.1.4 (reviewing policies behind judicial reluctance to vacate, modify or correct awards).

168. *Cf.* *Diamond*, *supra* note 83, at 61-62 (defining as procedural the process for confirming an award).

169. *E.g.*, *AT&T v. United Computer Sys., Inc.*, No. 99-56846, 2001 WL 389451, 7 Fed. Appx. 784, 787 (9th Cir. Feb. 7, 2001); *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 795 (Mo. Ct. App. 1998).

170. *AT&T*, 7 Fed. Appx. at 787 (stating that grounds for vacatur motion "affects the allocation of authority between courts and arbitrators"); *Edward D. Jones & Co.*, 969 S.W.2d at 795 (holding that grounds for vacatur are substantive in nature, not procedural, because "they create, define and regulate rights").

circumstance, the parties' choice of the finality of arbitration as a means of dispute resolution would be threatened.¹⁷¹ Courts could permit lengthy appeals in which the courts second-guessed the merits of the decision of the arbitrators. This would constitute a re-allocation—from the arbitrators to the courts—of the authority to decide parties' disputes with finality and then would substantively alter the nature of arbitration as contemplated by the FAA.

While, of course, a statute authorizing such broad judicial review would be anti-arbitration and inconsistent with the spirit of the FAA, in reality, no state currently authorizes such broad review. Moreover, most states' public policies support extremely limited review of the merits of awards to reinforce the expeditious and inexpensive nature of arbitration.¹⁷² Any vestigial state anti-arbitration sentiment is expressed through laws singling out arbitration agreements for hostile treatment rather than laws designed to increase state court dockets once parties submit to arbitration. Therefore, while in theory vacatur could be transformed into a substantive rule if stretched to its logical extreme, no state stretches it that far and thus preemption concerns do not arise.

B. Manifest Disregard is Not Part of the FAA

A corollary principle to this framework is that the manifest disregard prong also does not apply in state court, unless that state has adopted the test under state law. Most courts characterize this standard as non-statutory, part of federal arbitration law but not part of the FAA.¹⁷³

171. See Hayford, *supra* note 18, at 741-42 ("The public policy reflected in the Federal Arbitration Act is intended to give effect to the bargain [of parties to forego resort to the courts in order to secure the benefits of arbitration] and to hold the parties to it by enforcing the agreement to arbitrate and making it very difficult to secure judicial vacatur of objectionable arbitration awards."); Amy Schmitz, *Ending A Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002) (arguing for narrow review of awards to meet parties' expectations that arbitration has finality).

172. *E.g.*, *Moncharsh v. Hejly & Blaise*, 832 P.2d 899, 904 (Cal. 1992); *Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co.*, 553 N.E.2d 1284, 1285 (Mass. 1990).

173. *Hoelt, III v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003); *Siegel v. Prudential Ins. Co. of Am.*, 79 Cal. Rptr. 2d 726, 739 (Cal. Ct. App. 1998) (collecting cases); *Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853 (Tenn. Ct. App. 2001) (declining to include manifest disregard as ground of vacatur under FAA); see also Julie K. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 COLUM. BUS. L. REV. 1, 18-19 (identifying "manifest disregard" as a common law, nonstatutory ground of

Because the need for preemption arises when the congressional *statutory* scheme of the FAA conflicts with state law, federal laws developed by the *judiciary* should not displace state arbitration law. In other words, as long as the federal common law does not reflect congressional intent, preemption is irrelevant. Thus, state courts should not apply that prong if, under state arbitration law, manifest disregard is not a recognized ground of vacatur.

This is consistent with conflict preemption principles. Because the manifest disregard standard supplements statutory grounds for vacatur, application of this ground can only make it easier for losing parties to upset the arbitration panel's findings and award. Thus, applying a state rule that precludes the manifest disregard ground cannot contradict the pro-arbitration policy of the FAA; to the contrary, by reducing the avenues to upset the arbitration outcome, the state rule supports the pro-arbitration policy. Therefore, state courts should not feel compelled to apply a manifest disregard standard to a vacatur motion on preemption grounds.

C. *State Courts Should Apply State Vacatur Law Unless Those Grounds Conflict with the Substantive Principle of Arbitrability of the FAA*

As discussed earlier, Professors Hayford and Palmiter provide a blueprint for states to preserve a role in arbitration federalism.¹⁷⁴ That blueprint expressly contemplates that, on the issue of post-award judicial review, a matter within the FAA preemption "boundary," the states should play a useful role in setting the parameters of preemption while furthering the strong pro-arbitration national public policy.¹⁷⁵ I propose the following framework to meet these goals and to provide guidance to a state court deciding a motion to vacate:

vacatur); Hayford, *supra* note 18, at 774-78, 810-19 (terming "manifest disregard" the "seminal nonstatutory ground for vacatur" but offering a theory to reconcile the standard with the FAA). *But see* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003) (en banc) (classifying "manifest disregard of the law" standard under section 10(a)(4) of the FAA—which permits vacatur where arbitrators "exceeded their powers"); Groceman v. Pulte Homes Corp., 53 S.W.3d 599, 602 (Mo. Ct. App. 2001) (holding that manifest disregard is a vacatur ground under the FAA); Int'l Bank of Commerce-Brownsville v. Int'l Energy Dev. Corp., 981 S.W.2d 38, 48 (Tex. App. 1988) (holding that parties' choice of FAA includes manifest disregard and noting that Texas law includes the analogous ground of "gross mistake").

174. See Hayford & Palmiter, *supra* note 15.

175. *Id.* at 178.

1. The court must first determine whether the arbitration agreement is governed by the FAA, i.e., whether the underlying transaction involves commerce. Because the Supreme Court interprets that phrase extremely broadly, virtually any commercial transaction is likely to be controlled by the FAA. If the FAA does not govern, then the court need not examine issues of FAA preemption and can apply either the parties' chosen vacatur law or that court's state vacatur law.
2. If the parties' arbitration agreement includes a choice-of-law clause designating a particular state's law as governing the dispute, then, under that state's law of contract interpretation, the court must determine whether the clause refers to state substantive law governing the underlying contractual relationship, or whether it also includes state arbitration and/or procedural law governing the arbitration process.¹⁷⁶ The court's determination on this issue will then designate whether state law grounds of vacatur or section 10 of the FAA controls the motion to vacate.
3. If the parties' arbitration agreement does not contain a choice-of-law clause, or the choice-of-law clause does not include arbitration law, then the court must examine the state arbitration law setting forth grounds for vacatur and make a determination whether applying those grounds would conflict with the substantive principle of the FAA—to enforce parties' arbitration agreements according to their terms. If they do not, then the court can apply state vacatur law; if they do (e.g., if state law grounds provide for a broad *de novo* standard of review), then the court should apply section 10 of the FAA.
4. Even if the state court determines that the FAA applies, the court need not include the manifest disregard standard of review. Only if applicable state law includes manifest

176. Practically speaking, this is a very subjective and difficult determination for a court to make, as parties rarely discuss the meaning of boilerplate language.

disregard as a test should the state court apply that standard.

VI. CONCLUSION

Applying this framework to vacatur motions filed in state court should avoid over-preemption of state vacatur law. While many scholars have concluded that the Supreme Court's recent FAA jurisprudence has sounded the death knell for state arbitration law, state courts need not fear the preemptive effect of the FAA. Reducing the grounds available to vacate a multi-million dollar arbitration award can only strengthen the finality of arbitration awards, and fulfill parties' expectations that a choice of state vacatur law—either by contract through a choice-of-law clause in the pre-dispute arbitration agreement, or by filing a motion to vacate in state court—will result in the application of state law.